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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS HERNANDEZ,

Defendant and Appellant.

F039816

(Super. Ct. Nos. 662292-2;  
F99909566-2)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Fresno County. Lawrence Jones, Judge.

Marisa Nayfach, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Carlos A. Martinez and James B. Damrell, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Vartabedian, Acting P.J., Cornell, J. and Gomes, J.

## INTRODUCTION

Appellant Carlos Hernandez challenges the sentencing court's decision to impose the upper, or aggravated, term for his second degree robbery conviction on the basis that the trial court abused its discretion in that the factors relied upon by the trial court to impose the upper term are not supported by the evidence. We disagree and will affirm.

## STATEMENT OF THE CASE AND FACTS

On August 11, 1999, Hernandez pled guilty to a charge of assault with a deadly weapon. On October 20, 1999, Hernandez was sentenced to three years' felony probation.

On July 4, 2001, while on felony probation, Hernandez and three others surrounded their victim, who was walking on the sidewalk. Hernandez forcefully took a silver bracelet from the victim's wrist and helped rip a gold necklace from the victim; another perpetrator hit the victim with his fist; two other perpetrators searched the victim's pockets and took a \$5 bill. The victim told officers that one of the perpetrators had carried a screwdriver.

Hernandez was charged with second degree robbery. It also was alleged that he had two prior convictions for assault with a deadly weapon that qualified as strikes for purposes of Penal Code<sup>1</sup> section 667, subdivisions (b) through (i), and section 1170.12, subdivisions (a) through (d). On October 18, 2001, Hernandez pled no contest to the second degree robbery charge and admitted the prior strike allegations. The plea was entered in conjunction with the filing of a motion pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, and the understanding that the trial court "will strike at least one of the strikes and certainly consider a term less than 15 years at the time of sentencing."

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<sup>1</sup> References to code sections are to the Penal Code unless otherwise specified.

On November 29, 2001, the trial court granted the *Romero* motion, struck one of the prior convictions, and imposed the upper term of five years, doubled to ten years pursuant to section 667, subdivision (e)(1), for the second degree robbery conviction. In addition, a consecutive five-year enhancement was imposed pursuant to section 667, subdivision (a)(1), for a total term of 15 years.

On January 24, 2003, Hernandez filed a notice of appeal. On January 27, 2003, Hernandez filed a motion with this court seeking an order compelling the superior court to issue a certificate of probable cause.

### **DISCUSSION**

Hernandez appeals challenging the imposition of the upper term on the second degree robbery conviction as an abuse of discretion asserting none of the factors in aggravation are supported by the evidence. The parties disagree as to whether a certificate of probable cause is needed in this case in order to challenge the sentence. We will assume, without deciding, that the 15-year term was not agreed to by Hernandez as a part of the plea agreement and thus, no certificate of probable cause is required. Hernandez also requests that the abstract of judgment be amended to reflect that the conviction was of second and not first degree robbery. The People concede that the abstract of judgment should be amended.

#### ***Term of Imprisonment***

Hernandez claims the trial court relied solely on the aggravating factor that he had engaged in violent conduct which indicated a serious danger to society and that the record evidence does not support this aggravating factor. His claim is without merit.

California Rules of Court,<sup>2</sup> rule 4.421, lists the circumstances that constitute aggravating factors, including that the defendant has been convicted of other offenses for

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<sup>2</sup> References to rules are to the California Rules of Court unless otherwise noted.

which a consecutive sentence could be imposed, but a concurrent sentence is being imposed; the defendant has engaged in violent conduct which indicates a serious danger to society; the defendant's prior convictions are numerous or of increasing seriousness; the defendant has served a prior prison term; the defendant was on probation or parole when the crime was committed; and the defendant's performance on probation or parole was unsatisfactory. (Rule 4.421(a)(7) & (b)(1)-(5).)

Rule 4.409 states that the relevant sentencing criteria shall be deemed to have been considered by the trial court, unless the record affirmatively reflects otherwise. The record affirmatively reflects that the trial court considered and evaluated numerous factors, as set forth in the probation report and as argued by counsel at the sentencing hearing.

When the trial court stated the intended sentence, the court noted that it had reviewed the probation officer's report, taken into consideration the entirety of the circumstances, and believed that a sentence of 15 years was appropriate under the circumstances. A judge's subjective belief regarding the appropriate length of sentence for the offense is not improper, so long as it is guided by the discretionary factors outlined in the statutory sentencing criteria. (*People v. Calderon* (1993) 20 Cal.App.4th 82, 88.)

The probation officer's report noted several factors in aggravation and none in mitigation with respect to the second degree robbery offense. The trial court specifically noted at the sentencing hearing that it was imposing a concurrent, instead of a consecutive sentence, for the section 245, subdivision (a)(1), offense for which Hernandez had been on probation. Imposing a concurrent, rather than a consecutive sentence, qualifies as an aggravating factor under rule 4.421(a)(7). Further, by committing the second degree robbery offense while on probation, Hernandez falls within the aggravating factor set forth in rule 4.421(b)(4).

The trial court further noted that Hernandez's criminal history included an attempt to stab a victim and another offense that involved use of a weapon, as well as the current offense where Hernandez threatened the victim in concert with three others. In addition, the trial court noted that Hernandez had two prior convictions that qualified as strikes under Three Strikes and, but for the court's action in striking one of the prior convictions, Hernandez would be facing a sentence of 30 years to life. This recitation of Hernandez's criminal history and his prior serious and violent felonies reflects the trial court's evaluation and consideration of the aggravating factor set forth in rule 4.421(b)(1). The trial court also noted that Hernandez had served a prior term of imprisonment, which qualifies as an aggravating factor under rule 4.421(b)(3).

Only a single aggravating factor is required to impose the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728.) The record evidence establishes that not one but several aggravating factors were present and considered by the trial court in imposing the aggravated term.

Finally, even if we were to view the trial court as having relied on the single aggravating factor that Hernandez engaged in violent conduct which indicated a serious danger to society, that factor is supported by the record evidence. Hernandez's contention that he has not engaged in serious or violent conduct that poses a danger to society because none of his victims were seriously injured is without merit. Hernandez was twice convicted of assault with a deadly weapon, which is statutorily defined as a serious offense. (§ 1192.7, subd. (c)(1).) The current offense for which Hernandez stands convicted also involved the use of a potentially deadly weapon, although the evidence does not establish which of the four perpetrators actually held the weapon. That Hernandez failed to seriously injure any of the three victims does not diminish the gravity of the offenses. (See *People v. Reid* (1982) 133 Cal.App.3d 354, 369.)

### ***Abstract of Judgment***

Robbery is either first or second degree. (§ 212.5.) The abstract of judgment does not identify whether Hernandez stands convicted of first or second degree robbery. Both Hernandez and the People concede that the abstract should be amended to reflect the conviction for second degree robbery.

### ***Certificate of Probable Cause***

As set forth *supra*, for purposes of this appeal, we deemed the issues raised by Hernandez to be sentencing issues for which no certificate of probable cause is required. In light of this, the motion for an order directing the superior court to issue a certificate of probable cause is moot.

### **DISPOSITION**

The judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting that the conviction is for second degree robbery. The motion for an order directing the superior court to issue a certificate of probable cause is denied as moot.